



Signed: June 06, 2005

Leslie Tchaikovsky

LESLIE TCHAIKOVSKY
U.S. Bankruptcy Judge

UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF CALIFORNIA

In re No. 04-46041 TM
Chapter 13
ARTURO R. CARRASCO,
Debtor.
_____ /

MEMORANDUM OF DECISION

The motion of Paul Mansdorf ("Mansdorf"), the former chapter 7 trustee in the above-captioned case before its conversion to chapter 13, to reconvert the case to chapter 7 and to require the attorney for the above-captioned debtor (the "Debtor"), Barbara A. Smart ("Smart"), to disgorge her retainer came on before the Court for an evidentiary hearing on June 3, 2005. Having heard the evidence and argument presented, the Court concludes that the case should be reconverted to chapter 7 but that the motion to disgorge should be denied. The reasons for the Court's decision are set forth below.¹

¹The Court previously issued a tentative ruling, approving the fee applications of Mansdorf and his attorneys, Stromsheim & Associates ("Stromsheim"). That ruling is now made final except

1 The Debtor filed a voluntary petition seeking relief under
2 chapter 7 of the Bankruptcy Code. He failed to schedule any real
3 property and, when asked whether he owned any real property at the
4 11 U.S.C. § 341 meeting of creditors, declared under oath that he
5 did not. In fact, at that time, he and his wife were the legal
6 owners of real property in Hayward, California (the "Hayward
7 Property").²

8 The Hayward Property is a duplex. The Debtor obtained his
9 interest in the Hayward Property in 1998. Title was taken in
10 joint tenancy by the Debtor, the Debtor's wife, and the Debtor's
11 then son-in-law, Jose Parra ("Parra"). The Debtor's daughter and
12 Parra occupied one of the units. The Debtor and his wife occupied
13 the other.

14 In or about 2000, the Debtor's daughter and Parra divorced.
15 In 2004, Parra was removed from title but the Debtor and his wife
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18 that, given the reconversion of the case, Mansdorf's fees are
19 subject to the statutory cap. In addition, although not listed
20 on the calendar, a status conference on Mansdorf's adversary
21 proceeding objecting to the Debtor's discharge had been
22 continued to the June 3, 2005 hearing date. Mansdorf is
23 directed to contact the Court's calendar clerk promptly to
24 reschedule this status conference.

25 ²Mansdorf filed a complaint seeking to sell the Hayward
26 Property as co-owned property pursuant to 11 U.S.C. § 363(h).
Neither the Debtor nor his wife responded to the complaint, and
Mansdorf obtained a judgment. However, on or about January 18,
2005, they executed a grant deed transferring the Debtor's
interest in the Hayward Property to the Debtor's wife as her
separate property. Since then, the Debtor's daughter has
advised Mansdorf that the Debtor's wife obtained approximately
\$24,000 by refinancing the secured debt on the Hayward Property.

1 were not. The Debtor's daughter has since remarried and lives in
2 one of the duplex units with her new husband. However, neither
3 the Debtor's daughter nor her new husband has ever been placed on
4 title.

5 Before the case was converted, the Debtor's daughter
6 negotiated a settlement with Mansdorf, ostensibly on behalf of the
7 Debtor, providing that the estate would receive \$50,000 in return
8 for an abandonment of the Hayward Property and dismissal of a
9 complaint filed by the Mansdorf seeking to deny the Debtor's
10 discharge. Any funds remaining after claims and administrative
11 expenses were paid would be paid to the Debtor. However, when
12 notice of the proposed compromise was sent with an opportunity to
13 request a hearing, the Debtor filed an objection to the proposed
14 compromise and a motion to convert the case to chapter 13.

15 At the hearing on the motion to reconvert the case, the Debtor
16 and the Debtor's daughter both testified under oath that the
17 Debtor had never held any equitable interest in the Hayward
18 Property. They both stated that neither he nor his wife
19 contributed to the down payment for the Hayward Property or to any
20 of the monthly mortgage payments. The Debtor's daughter testified
21 that she had included her mother on title because her mother had
22 better credit. She claimed that the title company told her that,
23 if her mother was on title, her father had to be too. No
24 documents were provided to support these statements.

25 The Court finds the evidence insufficient to establish that
26 the Debtor does not hold an equitable interest in the Hayward

1 Property. California law creates a rebuttable presumption that
2 equitable ownership of real property is consistent with legal
3 title. This presumption can only be overcome with clear and
4 convincing evidence. Cal. Evidence Code § 662; Schindler v.
5 Schindler, 126 Cal. App. 2d 597, 601-02 (1954).³ The evidence
6 presented was neither clear nor convincing.

7 In particular, the series of deeds executed is at variance
8 with the story told by the Debtor and his daughter. If the only
9 equitable owner of the Hayward Property has always been the
10 Debtor's daughter (and one or other of her husbands), it makes no
11 sense that, in 2004, when Parra was removed from title, the
12 Debtor's daughter was not placed on title. It makes even less
13 sense that, in January 2005, when the Debtor attempted to remove
14 himself from title, he transferred his interest in the Hayward
15 Property to his wife, not to his daughter.⁴

17 ³See Weaver v. Weaver, 224 Cal. App. 3d 478, 487 (1990),
18 quoting from Sheean v. Sullivan, 126 Cal. 189, 193 (1899),
19 (describing the "clear and convincing" standard as requiring
20 evidence that is "'sufficiently strong to command the
unhesitating assent of every reasonable mind.'")

21 ⁴Several people referred to the Debtor as "slow." The
22 Court did not perceive the Debtor to be "slow." Although
23 relatively unsophisticated, the Debtor did not seem lacking in
24 intelligence or to be mentally impaired in any way. His primary
25 language is Spanish and, at the hearing, he used a translator.
26 However, the Debtor's bankruptcy attorney communicated with him
in Spanish when he prepared the schedules. At the hearing, the
Debtor's chapter 7 attorney testified that he asked the Debtor
whether he owned any real property and that the Debtor said that
his wife owned real property but that it had always been her
separate property. This is at odds with the story presented
currently.

1 Given the Court's assessment that the Debtor has not only
2 failed to schedule real property in which he owns an interest and
3 has more recently lied under oath about his interest in that real
4 property, the Court does not believe that the Debtor is a good
5 candidate for chapter 13. The Debtor has proposed a plan to pay
6 his creditors in full over 58 months at the rate of \$900 per
7 month.⁵ However, the equity in the Hayward Property appears to be
8 sufficient to pay creditors in full in short order.
9 Alternatively, the Debtor may choose to withdraw his objection to
10 the compromise and permit the Trustee to use whatever portion of
11 the \$45,000 currently held to pay creditors. Mansdorf is directed
12 to confer with the Debtor to determine his preference after the
13 claims bar date has passed.

14 However, Mansdorf's motion for an order requiring Smart to
15 disgorge the \$2,500 retainer obtained in connection with her
16 representation of the Debtor will be denied. She has obviously
17 expended at least this much obtaining conversion of the case to
18 chapter 13 and defending the motion to reconvert. The facts of
19 this case were not so clear cut that Smart had an ethical duty to
20 refuse to represent the Debtor in the conversion or in defending
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23 ⁵The Debtor now represents that the bulk of his income
24 comes from disability payments. The Debtor also failed to
25 schedule these payments. He blames this omission on his
26 bankruptcy attorney. His attorney testified that the Debtor
told him that his disability payments had been terminated. The
Court believed the Debtor's attorney and did not believe the
Debtor's claim that he had told his attorney that he received
disability payments.

1 the motion to reconvert. To require her fees to be disgorged
2 simply because her efforts were unsuccessful would be unfair and
3 would have a chilling effect on her desire to represent deserving
4 debtors in the future.

5 **CONCLUSION**

6 Mansdorf is directed to submit a proposed form of order,
7 granting the motion to reconvert the case to chapter 7, denying
8 the motion to disgorge, and granting the fee applications (subject
9 to Mansdorf's statutory cap).

10 END OF DOCUMENT
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